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## Tort Law

Robin Jean Davis  
*West Virginia Supreme Court of Appeals*

Louis J. Palmer Jr.

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Justice Cleckley sought to extend the protections of 42 U.S.C. § 1983 by attaching similar protections on state constitutional grounds. The opinion did this by holding that

[u]nless barred by one of the recognized statutory, constitutional or common law immunities, a private cause of action exists where a municipality or local governmental unit causes injury by denying that person rights that are protected by the Due Process Clause embodied within Article 3, § 10 of the West Virginia Constitution.<sup>356</sup>

#### XIV. LABOR LAW

The case of *Williams v. Precision Coil, Inc.*<sup>357</sup> examined whether employers could provide employees with handbooks that had disclaimers. Justice Cleckley held that “[f]or a disclaimer to be valid, it must be sufficiently clear, conspicuous, and understandable so that employees will know that the handbook provides them with no protection and it only is intended to benefit one side of the employment relationship, i.e., the employer.”<sup>358</sup>

#### XV. TORT LAW

##### A. *Statute of Limitations*

In *Donley v. Bracken*,<sup>359</sup> the cause of action limitation for incompetents found in W. Va. Code section 55-2-15 was construed. *Donley* held “[i]n order for a permanently incompetent person to maintain a viable and timely action under W. Va. Code, 55-2-15 (1923), the lawsuit must be brought within twenty years of the date of the wrongful act and the injury.”<sup>360</sup> The opinion also determined that “[t]he twenty year cap in W. Va. Code, 55-2-15 (1923), is reasonably related to the legislative goal of preventing stale law suits and the failure to impose a similar cap on competent persons does not adversely discriminate against the mentally

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<sup>356</sup> *Id.* at Syl. Pt. 2.

<sup>357</sup> 459 S.E.2d 329 (W. Va. 1995).

<sup>358</sup> *Id.* at Syl. Pt. 6.

<sup>359</sup> 452 S.E.2d 699 (W. Va. 1994).

<sup>360</sup> *Id.* at Syl. Pt. 1.

disabled.”<sup>361</sup>

It was said in *Harrison v. Davis*<sup>362</sup> that “[i]nconclusive assertions indicating that third parties, rather than named defendants, misrepresented material facts do not operate to toll the statute of limitations for a personal injury claim.”<sup>363</sup> *Harrison* also ruled that

An extension of the statutory filing period for a wrongful death claim requires an affirmative act of fraud, misrepresentation, or concealment of material facts by named defendants. Bare assertions that third parties misrepresented the decedent’s cause of death, coupled with conclusory allegations that named defendants may or may not have contributed indirectly to those misrepresentations, do not rise to the level of affirmative actions by the named defendants as contemplated by Syllabus Point 2 of *Miller v. Romero*, 186 W.Va. 523, 413 S.E.2d 178 (1991).<sup>364</sup>

#### B. *Cause of Action by Attorney General*

The case of *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*<sup>365</sup> recognized the right of the state attorney general to bring a consumer related civil action:

The Attorney General clearly has the right to bring a civil action against an assignee to collect a refund of an excess charge imposed upon a consumer regardless of whether the assignee committed any wrongdoing. The issue of wrongdoing only is relevant under W.Va. Code, 46A-7-111(1) (1974), when the assignee may be subjected to a “civil penalty.” If the assignee can establish an unintentional violation or a bona fide error on the part of the wrongdoer by a preponderance of the evidence, a penalty may not

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<sup>361</sup> *Id.* at Syl. Pt. 5.

<sup>362</sup> 478 S.E.2d 104 (W. Va. 1996).

<sup>363</sup> *Id.* at Syl. Pt. 3.

<sup>364</sup> *Id.* at Syl. Pt. 5.

<sup>365</sup> 461 S.E.2d 516 (W. Va. 1995).

be imposed under this subsection. W.Va. Code, 46A-7-111(1).<sup>366</sup>

C. *Libel*

Justice Cleckley addressed the law of libel in *State ex rel. Suriano v. Gaughan*:<sup>367</sup>

Under West Virginia law, a libel plaintiff's status sets the standard for assessing the defendant's conduct. Plaintiffs who are public officials or public figures must prove by clear and convincing evidence that the defendants made their defamatory statement with knowledge that it was false or with reckless disregard of whether it was false or not. Private figures need only show that the defendants were negligent in publishing the false and defamatory statement.<sup>368</sup>

Justice Cleckley also observed,

[t]he law of libel takes but one approach to the question of falsity, regardless of the form of the communication. It overlooks minor inaccuracies and concentrates upon substantial truth. Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified. A statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced.<sup>369</sup>

Finally, the opinion in *Suriano* carved out the defense for a defendant in a libel action:

A libel plaintiff is a limited purpose public figure if the defendant proves the following:

- (1) the plaintiff voluntarily engaged in significant efforts

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<sup>366</sup> *Id.* at Syl. Pt. 5.

<sup>367</sup> 480 S.E.2d 548 (W. Va. 1996).

<sup>368</sup> *Id.* at Syl. Pt. 2.

<sup>369</sup> *Id.* at Syl. Pt. 4.

to influence a public debate – or voluntarily assumed a position that would propel him to the forefront of a public debate – on a matter of public concern;

(2) the public debate or controversy and the plaintiff's involvement in it existed prior to the publication of the allegedly libelous statement; and

(3) the plaintiff had reasonable access to channels of communication that would permit him to make an effective response to the defamatory statement in question.<sup>370</sup>

#### D. *Verdict Award*

In *Reed v. Wimmer*,<sup>371</sup> the court held,

[b]efore a verdict may be reversed on the basis of excessiveness, the trial court must make a detailed appraisal of the evidence bearing on damages. Because the verdict below is entitled to considerable deference, an appellate court should decline to disturb a trial court's award of damages on appeal as long as that award is supported by some competent, credible evidence going to all essential elements of the award.<sup>372</sup>

The case of *Bullman v. D & R Lumber Co.*<sup>373</sup> concerned treble damages provided under a specific statute. Justice Cleckley explained the statute as follows:

The treble damage award available under W. Va. Code, 61-3-48a (1983), is to provide compensatory damages to landowners for damaged or removed timber, trees, logs, posts, fruit, nuts, growing plants, or product of any growing plant. By allowing such increase in recovery from the market value of the item removed, the Legislature provided a remedy that would more adequately compensate landowners. The overriding purpose of the treble damage provision is to award the victim adequate compensation.

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<sup>370</sup> *Id.* at Syl. Pt. 3.

<sup>371</sup> 465 S.E.2d 199 (W. Va. 1995).

<sup>372</sup> *Id.* at Syl. Pt. 4.

<sup>373</sup> 464 S.E.2d 771 (W. Va. 1995).

Its amerciable effect, if any, is secondary.<sup>374</sup>

The opinion went on to hold, “W. Va. Code, 61-3-48a (1983), specifically states that the treble damage award shall be in addition to and notwithstanding any other penalties by law provided. Applying the clear language of the statute, a plaintiff does not foreclose his or her claim for punitive damages by seeking recovery under W.Va. Code, 61-3-48a.”<sup>375</sup>

The issue of prejudgment interest was noted in *Gribben v. Kirk*.<sup>376</sup> Justice Cleckley held that “[i]n cases of ‘special damages,’ prejudgment interest must be granted as a matter of right.”<sup>377</sup>

### E. *Wrongful Death*

The case of *Gooch v. West Virginia Department of Public Safety*<sup>378</sup> was a wrongful death action in which a hospital was one of the named defendants. The decedent was arrested for driving under the influence and transported to the defendant hospital by a state trooper to have blood drawn. The blood was drawn and the decedent was taken to jail. Several days later the decedent died of strep pneumonia. In determining liability of the hospital from the visit, Justice Cleckley held,

[t]o establish a hospital-patient relationship, unless otherwise imposed by law, there must be a natural person who receives or should have received health care from a licensed hospital under a contract, expressed or implied. W.Va. Code, 55-7B-2(e) (1986). As a matter of law, a hospital-patient relationship cannot be created merely by virtue of an arrestee being presented to a hospital for a drug and alcohol blood test. To avoid summary judgment, a plaintiff must show sufficient additional evidence beyond the presentation for a driving under the influence blood test to demonstrate either an expressed or implied contract between the

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<sup>374</sup> *Id.* at Syl. Pt. 1.

<sup>375</sup> *Id.* at Syl. Pt. 2.

<sup>376</sup> 466 S.E.2d 147 (W. Va. 1995).

<sup>377</sup> *Id.* at Syl. Pt. 4.

<sup>378</sup> 465 S.E.2d 628 (W. Va. 1995).

parties was created.<sup>379</sup>

Justice Cleckley held in *Farley v. Sartin*<sup>380</sup> that “[a] tortious injury suffered by a nonviable child *en ventre sa mere* who subsequently is born alive is compensable and no less meritorious than an injury inflicted upon a viable child who subsequently is born alive.”<sup>381</sup> Justice Cleckley further held,

[i]n light our previous interpretation of W. Va. Code, 55-7-5, and the goals and purposes of wrongful death statutes generally, the term ‘person,’ as used in W. Va. Code, 55-7-5 (1931) and the equivalent language in its counterpart, W. Va. Code, 55-7-6 (1992), encompasses a nonviable unborn child and, thus, permits a cause of action for the tortious death of such child.<sup>382</sup>

#### F. *Joint Tortfeasors*

The case of *Savage v. Booth*<sup>383</sup> stated that “[t]he right to assert an act is *malum in se* to avoid contribution belongs to a joint-tortfeasor.”<sup>384</sup>

#### G. *Immunity*

Justice Cleckley addressed the issue of immunity from liability in *Hutchison v. City of Huntington*:<sup>385</sup>

The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity

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<sup>379</sup> *Id.* at Syl. Pt. 7.

<sup>380</sup> 466 S.E.2d 522 (W. Va. 1995).

<sup>381</sup> *Id.* at Syl. Pt. 1.

<sup>382</sup> *Id.* at Syl. Pt. 2.

<sup>383</sup> 468 S.E.2d 318 (W. Va. 1996).

<sup>384</sup> *Id.* at Syl. Pt. 2.

<sup>385</sup> 479 S.E.2d 649 (W. Va. 1996).

determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.<sup>386</sup>

Justice Cleckley observed in *Gooch v. West Virginia Department of Public Safety*<sup>387</sup> that “W. Va. Code, 17C-5-6 (1981), specifically provides civil immunity to institutions and individuals who draw blood at the direction of a police officer unless there is gross negligence or willful or wanton injury.”<sup>388</sup>

#### H. *Retroactiveness of Statute*

In *Public Citizen, Inc. v. First National Bank in Fairmont*,<sup>389</sup> the court stated that “[a] statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute (or the date of enactment if no separate effective date is stated) unless the statute provides explicitly for retroactive application.”<sup>390</sup>

### XVI. ADMINISTRATIVE LAW

#### A. *Administrative and Judicial Litigation of Same Issue*

The question of litigating a matter before an administrative tribunal and attempting to litigate the same issue in circuit court was addressed in *Vest v. Board of Education of County of Nicholas*:<sup>391</sup>

For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is no statutory authority directing otherwise, the prior decision must be rendered pursuant to the agency’s adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court. In addition, the identity of the issues

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<sup>386</sup> *Id.* at Syl. Pt. 1.

<sup>387</sup> 465 S.E.2d 628 (W. Va. 1995).

<sup>388</sup> *Id.* at Syl. Pt. 8.

<sup>389</sup> 480 S.E.2d 538 (W. Va. 1996).

<sup>390</sup> *Id.* at Syl. Pt. 2.

<sup>391</sup> 455 S.E.2d 781 (W. Va. 1995).